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ADMINISTRATIVE DECISIONS ELIGIBLE FOR JUDICIAL REVIEW IN WISCONSIN

RAMON A. KLITZKE*

I. INTRODUCTION

The right of meaningful access to the judicial branch of government for parties aggrieved by the action or inaction of administrative agencies is a basic tenet of the present administrative law system in this country. While vast areas of authority have been consigned to the administrative branch of government, that branch has not yet been accorded complete autonomy in all quasi-judicial matters.¹ Some would argue that certain agencies have been delegated supreme power,² particularly with respect to the routine functioning of those agencies.³ As autonomous as these agencies may appear, however, the citizen wronged by an agency is not without recourse to a court or to corrective legislative measures, even though such latter measures may benefit only those citizens who may deal with the agency in the future.⁴

The advent of a massive and complex administrative law system in the United States made it incumbent upon the law to develop a finely tuned mechanism to be used whenever necessary for the judicial review of agency decisions.⁵ On the one

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1. An interesting, recent Wisconsin case discussed legislative delegation of broad authority to administrative agencies: *State v. Department of Indus., Labor & Human Relations*, 77 Wis. 2d 126, 252 N.W.2d 353 (1977).

2. Statutory delegation of power to administrative agencies under broad standards has been approved by the United States Supreme Court since the 1930's. *See, e.g.*, *Tagg Bros. v. United States*, 280 U.S. 420 (1930) ("just and reasonable"); *New York Cent. Secur. Corp. v. United States*, 287 U.S. 12 (1932) ("public interest"); *Federal Trade Comm'n v. Gratz*, 353 U.S. 421 (1920) ("unfair methods of competition").

3. In terms of quantity, promulgation of rules overshadows quasi-judicial matters. The courts carefully scrutinize procedures by which rules are adopted by agencies. *Dane County v. Department of Health & Social Services*, 79 Wis. 2d 323, 255 N.W.2d 539 (1977).

4. The Wisconsin court has approved broad statutory delegation of power under the test of "sufficient standard." *State ex rel. Wisconsin Inspection Bureau v. Whitman*, 196 Wis. 472, 220 N.W. 929 (1928); *Schmidt v. Department of Local Affairs & Dev.*, 39 Wis. 2d 46, 158 N.W.2d 306 (1968).

5. The Wisconsin legislature, joining those of other states, met this challenge by

hand, it was recognized that many of the advantages of the administrative system would be lost if judicial review became a process by which the courts substituted their judgment for that of the agencies on matters of both law and fact. On the other hand, it became apparent that officers appointed to administrative posts were indeed human, and error in judgment, sometimes substantial, was not unknown. The law of judicial review has thus become a law of compromise—an attempt to balance the extremes of judicial constriction and judicial permissiveness. For example, a court might smile approvingly at the diligent effort of an agency to apply its recognized expertise to a technical problem requiring a technical solution,⁶ but in the very next case, the same court might recoil from any attempt by the agency to usurp the historical and constitutional mandate lodged only in the judicial branch of government.⁷

This article examines the working relationship between courts and administrative agencies and attempts to discern the type of administrative matter which courts will accept for review. The forum for this analysis is Wisconsin and the focal points are the supreme court's interpretation of the Wisconsin Administrative Procedure and Review Act⁸ and its attitude toward agency decisions⁹ as evidenced in recent opinions.

II. THE PROBLEM OF JUDICIAL REVIEW

It is the rare Wisconsin lawyer who will never have occasion

providing a procedure for review of administrative decisions. For a discussion of the Wisconsin statute, see Hoyt, *The Wisconsin Administrative Procedure Act*, 1944 Wis. L. REV. 214, 226-38.

6. See, e.g., *Robinson v. Kunach*, 76 Wis. 2d 436, 446, 251 N.W.2d 449, 453 (1977). The court held that counties were not "agencies of the state" as meant by the Wisconsin Environmental Protection Act in Wis. STAT. § 1.11(2)(c) (1975). The administrative action in question had not included counties within the term, "agencies of the state."

7. In *Department of Revenue v. Milwaukee Ref. Corp.*, 80 Wis. 2d 44, 257 N.W.2d 855 (1977), the court admitted that the agency had particular competence or expertise in the subject matter but refused to defer to the agency's application of the law where the court, in its opinion, was as competent as the agency to decide the question involved. In *Voight v. Washington Island Ferry Line*, 79 Wis. 2d 333, 255 N.W.2d 545 (1977), the Public Service Commission was not allowed to reverse the finding of its hearing examiner without specifying the evidence upon which it relied pursuant to Wis. STAT. § 227.12 (1973).

8. Wis. STAT. §§ 227.01-.26 (1975).

9. The Wisconsin Legislature has, in the 1975 amendment to § 227.20, recognized the need to emphasize the autonomy of the agencies. The Act now provides that the court "shall affirm" unless grounds for reversal are specifically found. Wis. STAT. § 227.20(2) (1975).

to utilize the law of administrative agencies. Many lawyers will frequently practice administrative law, and many will practice it exclusively. It is possible that lawyers may become so enamored with the system or disenchanted with the judicial system that administrative law will become an end in itself and not a stepping stone in the progressive dispensation of legal justice. It is not possible that the administrative system, even if ignored in the practice of some of the older, staid areas of the law, will ever wither. Indeed, administrative law is so firmly entrenched in American jurisprudence that it is more likely to seep into most areas of law so completely that the bright dividing line between the administrative and judicial branches may one day disappear.

To move from the agency to the court, at least at this point in the development of law, is to move from one medium to another. This is at once both a blessing and a curse. The lawyer appealing the administrative decision can use the superior position of the court not only to reverse that particular decision but also to contract the power of the agency in future cases. Sometimes the lawyer lives to regret this contraction if he must argue the opposite side of the issue in the next case. In any event, to appeal from the agency to the court is to advance to a more formal, more authoritative, more respected tribunal. If it is important to preserve and protect the sanctity of judicial adjudication of most legal matters then the two mediums must remain discrete and rules of judicial review must be strong, unambiguous, and perhaps even oppressive.

If, however, the growing autonomy of administrative agencies continues, and if it is recognized that more judicial and legislative decisions will have to be delegated to agencies, then the rules of judicial review will soften. If the complete merger of the administrative and judicial branches ever occurs, there would be, in fact, no need for rules of review which contemplate completely separate tribunals and the need to preserve the judicial superiority will no longer exist.

III. STATUTORY AVAILABILITY OF JUDICIAL REVIEW

In this country, the propriety of judicial review of administrative agency action has never been questioned.¹⁰ This is to be

10. Report of the Attorney General's Committee on Administrative Procedure 75 (1941).

expected under a system of law in which most legislative action is subject to judicial constitutional review. The question for discussion is what type of agency action is to be tested in the courts. Assuming that the proper parties are before the court, the scope of the court's reviewing power is in issue¹¹ and three questions must be resolved:

- (a) Has proper timing of the action for review been observed? (This includes the issue of ripeness.)
- (b) What is the statutory or other authority for judicial review?
- (c) Has the appellant chosen the proper form of action for review?

The second question, the authority for judicial review will be addressed first. While historically there was a need to rely upon constitutional power to review administrative action, ample authority for most species of judicial review has now been provided in statutory form.

The present Wisconsin statute defining reviewable administrative orders is an attempt to eliminate some of the ambiguity of its predecessor. In one respect there seems to be a contraction of the right to review, but in another respect the statute expands the right. The statute reads in part as follows:

227.15 Judicial Review; orders reviewable. Administrative decisions, which adversely affect the substantial interests of any person, whether by action or inaction, whether affirmative or negative in form, . . . shall be subject to judicial review as provided in this chapter.¹²

The statute which this replaced allowed judicial review of "[a]dministrative decisions, which directly affect the legal rights, duties or privileges of any person, whether affirmative or negative in form."¹³

The substitution of "adversely affect" for "directly affect" and "substantial interests" for "legal rights, duties or privileges" cannot be said to be the ultimate solution to all problems arising in the determination of which administrative decisions are subject to judicial review, but it is likely that some

11. For a discussion on the limited scope of review of an agency decision, see *Wisconsin's Environmental Decade v. Public Serv. Comm'n*, 79 Wis. 2d 161, 170, 255 N.W.2d 917, 923 (1977).

12. Wis. STAT. § 227.15 (1975), as amended by 1975 Wis. Laws, ch.414.

13. Wis. STAT. § 227.15 (1973).

degree of clarity has been achieved.

Although it may be debatable, the use of the term, "adversely affect," narrows the class of persons who are eligible to appeal administrative decisions. One may be "directly" affected by a decision, although not "adversely" affected. The converse, however, is always true: one "adversely" affected is always "directly" affected. To limit the number of persons who may appeal an administrative decision may be progress, depending upon the viewpoint of the observer. At any rate, it is a recognition that administrative agencies are to be accorded further power of control over their decisions.¹⁴

The effect of the substitution of "substantial interests" for "legal rights, duties and privileges" is, on its face, less clear. This term standing alone would expand the class of persons eligible to appeal. Were it not for the fact that these appellants must also be adversely affected, the class might be quite large, indeed. "Substantial" would be a term permitting a wide variety of interpretations if it were without precedent in administrative law. However, it has a familiar ring, and the development of the well-known substantial evidence rule¹⁵ limiting the scope of judicial review of agency decisions is witness to the proposition that the term as used in section 227.15 may soon acquire a more precise meaning. This, at least, is the hope of administrative lawyers and of the Judicial Council that drafted the bill containing the term.¹⁶

14. No attempt will made at this point to analyze the all-important term, "decision," although it may be observed in passing that the term is not to be read as broadly as might be suggested. *C & S Air Lines v. Waterman Corp.*, 333 U.S. 103, 106 (1948). Furthermore, the legislature intended to liberalize the class of parties having standing for review purposes. See text accompanying notes 51-56, *infra*.

15. The substantial evidence rule must be applied by the reviewing court to the agency's action: "The court shall, however, set aside agency action or remand the case to the agency if it finds that the agency's action depends on any finding of fact that is not supported by substantial evidence in the record." Wis. STAT. § 227.20 (6) (1975). Substantial evidence is more than a mere scintilla; it is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. It does not include the idea of weight of the evidence. *Gateway City Transfer Co. v. Public Serv. Comm'n*, 253 Wis. 397, 405-06, 34 N.W.2d 238, 242 (1948).

16. In 1973 the Wisconsin Judicial Council appointed an Administrative Law Committee to consider improvements to ch. 227 and to create a Municipal Administrative Procedures Act. The explanatory notes adopted by the Council to accompany the text of the assembly bill insist that the revised language is intended to follow the direction of the cases on standing for review in federal courts. The term, "substantial interests," was substituted for "legal rights, duties or privileges" to broaden the coverage of particular statutory sections. The substitution was made throughout the Act. See, e.g.,

IV. JUDICIAL POSTURE ON AVAILABILITY OF REVIEW

A. *Timeliness of Judicial Review*

Whether the Wisconsin Supreme Court will continue its conservative attitude toward the availability of judicial review of administrative decisions, in light of the apparent intent of the drafters of the revised statute to liberalize review, is a difficult question to answer. The starting point in the analysis must, of necessity, be the case of *Pasch v. Department of Revenue*.¹⁷

The *Pasch* case involved the reviewability of an income tax assessment, the merits of which were still pending before the Tax Appeals Commission when the taxpayer petitioned the circuit court for review of a Commission order upholding the jurisdiction of the Commission. The court observed that the order issued by the Commission, from which the Commission would proceed to a hearing upon the merits of the controversy, could more properly be called an interlocutory order rather than a final order, but that neither the form of the order nor the label of "final" or "interlocutory" necessarily determined its character as to reviewability.¹⁸ It was held that the circuit court had no jurisdiction to review the subject matter because, in the language of the statute, the order did not "directly affect the legal rights, duties or privileges" of the appellant. Furthermore, the court could not approve of the taxpayer's selection of one of several issues pending before the Commission, present it to the Commission in the form of a motion, and thereby achieve a separate review and appeal thereon.¹⁹ The court

WIS. STAT. §§ 227.01(2), (6) and (8) (1975). The term, "adversely affect," was substituted for, "directly," to avoid the semantic quibbling over standing through public interest groups. Thus, the intent was to broaden coverage. 1975 Wis. Assembly Bill 163, Judicial Council Note, enacted in 1975 Wis. Laws, ch.414.

17. 58 Wis. 2d 346, 206 N.W.2d 157 (1973). The *Pasch* case was followed and was controlling in *State v. Wisconsin Employment Relations Comm'n*, 65 Wis. 2d 624, 631, 223 N.W.2d 543, 547 (1974); was followed in *State ex rel. General Elec. Co. v. Department of Indus., Labor & Human Relations*, 68 Wis. 2d 688, 694, 229 N.W.2d 597, 601 (1975); was cited in *Wisconsin's Environmental Decade, Inc. v. Public Serv. Comm'n*, 69 Wis. 2d 1, 8, 230 N.W.2d 243, 247 (1975) and in *City of West Allis v. Wisconsin Employment Relations Comm'n*, 72 Wis. 2d 268, 240 N.W. 2d 416, 417 (1976). *Pasch* was quoted at length in *Friends of the Earth v. Public Serv. Comm'n*, 78 Wis. 2d 388, 404-05, 254 N.W. 2d 299, 305 (1977).

18. 58 Wis. 2d at 356, 206 N.W.2d at 162. Judicial review of a similar type of situation, interim rate orders, is discussed in *Friends of the Earth v. Public Service Comm'n*, 78 Wis. 2d 388, 403-11, 254 N.W. 2d 299, 305-08 (1977).

19. 58 Wis. 2d at 358, 206 N.W.2d at 163.

noted that review was strictly limited by statute; it was unwilling to review the "jurisdictional facts" of the Department's failure to act upon the taxpayer's application for abatement within the statutory six month period.²⁰

Similarly, in *State v. Wisconsin Employment Relations Commission*,²¹ a case relating to the grievance of a discharged employee, there was such a commingling of two issues before the hearing examiner that motions to dismiss and for summary judgment were held to be premature because there had not yet been an exhaustion of administrative remedies by the employee complainant.²² Relying on *Pasch*, the court would not approve the circuit court's review of the issue of whether the collective bargaining agreement provided the exclusive grievance procedure, even though the employer vigorously argued that this would require a full hearing before the Commission just to determine that the employee should have submitted to arbitration. The hearing examiner had decided that the issues of (1) discharge without just cause and (2) union breach of its duty of fair representation of the employee were not separable and had therefore denied the employer's motion as premature. The employer, of course, sought to have the second issue decided at once, so as to avoid a determination of the merits of the discharge before the Commission. The result reached by the court was defended as conducive to the avoidance of interruption of proceedings before administrative agencies and constant shifting back and forth between the agencies and the courts.²³ The court again refused to review the threshold jurisdictional issue separately.

The *Pasch* philosophy was embraced and reinforced in *State ex rel. General Electric Co. v. Department of Industry, Labor & Human Relations*.²⁴ This case is typical of the problems faced by the courts under the doctrine of primary jurisdic-

20. The leading case adopting the "jurisdictional facts" doctrine is *Crowell v. Benson*, 285 U.S. 22 (1932). But the *Crowell* case is probably no longer the law. DAVIS, ADMINISTRATIVE LAW TEXT 539 (3d ed. 1972).

21. 65 Wis. 2d 624, 223 N.W.2d 543 (1974).

22. *Id.* at 634-36, 223 N.W.2d at 548-50.

23. *Id.* at 637, 223 N.W.2d at 550. In a similar vein, the court held, in *City of West Allis v. Wisconsin Employment Relations Comm'n*, 72 Wis. 2d 268, 240 N.W.2d 416 (1976), that the circuit court had no jurisdiction to review an order of the Wisconsin Employment Relations Commission directing an election for collective bargaining purposes because of statutory constrictions in the Wisconsin Employment Relations Act.

24. 68 Wis. 2d 688, 229 N.W.2d 597 (1975).

tion: the determination of whether the court or the agency should make the initial decision.²⁵ The General Electric Company sought a writ of prohibition to stop the Equal Rights Division from acting further upon a complaint by a female employee of sex discrimination in promotion and compensation practices. The employer argued that the agency lacked jurisdiction because of a defective complaint, mootness, failure to pursue union remedy (which was similar to the argument made in *State v. Wisconsin Employment Relations Commission*), laches and statute of limitations.²⁶ Again in this case, the argument was pressed that the party brought before the administrative tribunal by the complainant would be subjected to undue hardship in the expenditure of time and funds in defending itself at a hearing which the agency had no power to conduct in the first instance, the matter being within the exclusive jurisdiction of the National Labor Relations Board.²⁷ Although the court admitted that some of the arguments of the employer may have had some merit, it concluded that the Administrative Procedure Act would provide adequate judicial review at a later stage in the proceedings and appeal to the circuit court was premature at this time.²⁸

The particular issue of the *Pasch* case relating to the reviewability of an interlocutory order by an agency was revisited in *Friends of the Earth v. Public Service Commission*.²⁹ This recent reaffirmance of limited judicial review of agency orders is further evidence that the Wisconsin Court will continue to be reluctant to interfere with administrative processes. The *Pasch* case was quoted extensively and, after noting that neither section 227.15 nor the statute covering judicial review of orders of the Public Service Commission expressly restricts its operation to final administrative orders, the court observed that "it is settled that not all decisions, orders or determinations which might fit within a literal reading of the statutes are subject to judicial review."³⁰ Review was denied because of the Public Service Commission's willingness to modify the order in question.³¹

25. See generally, DAVIS, ADMINISTRATIVE LAW TREATISE §§ 19.01-.09 (1958).

26. 68 Wis. 2d at 689, 229 N.W.2d at 598.

27. *Id.* at 694, 229 N.W.2d at 601.

28. *Id.* at 695, 229 N.W.2d at 601.

29. 78 Wis. 2d 388, 254 N.W.2d 299 (1977).

30. *Id.* at 404, 254 N.W.2d at 305.

31. *Id.* at 415, 254 N.W.2d at 310.

Closely related to the question of review of interim agency actions is the time-honored doctrine of exhaustion of administrative remedies. It can be seriously argued that this is merely another label for the same type of issues already discussed. The most recent case involving this issue is *Nodell Investment Corp. v. City of Glendale*,³² in which property owners brought a declaratory judgment action to declare certain deeds null and void. The plaintiffs had been required to convey a strip of land to the city as a condition for the approval of the construction of a bowling alley. When the city began purchasing additional frontage property, the plaintiffs, who had been required to convey their land gratuitously, brought the action, although they had not challenged the condition before the board of appeals. The court noted that the statute provided the exclusive remedy in this situation and drew an analogy between the exhaustion rule and the rule that appeal from a trial court may be taken only from a final judgment.³³ Having realized that there are some exceptions to the final judgment appeal rule, the court quickly observed that exhaustion is not always required. The exceptions are:

- (1) The agency has no jurisdiction to act in the matter.
- (2) The administrative action is fatally void.
- (3) A question of law is involved in which the administrative agency's expertise is not an important factor.
- (4) A substantial constitutional question is involved.
- (5) The administrative remedy is inadequate to avoid irreparable harm.
- (6) Recourse to the administrative agency would be a futile or useless act.³⁴

Because this case did not involve declaring an ordinance invalid, the administrative machinery provided by statute should have been utilized and the plaintiffs were precluded from circumventing them by the process of declaratory judgment. It should be noted that the Wisconsin Administrative Procedure Act specifically provides for declaratory judgment proceedings where the validity of a rule is at issue if the rule interferes with or impairs the legal rights and privileges of a

32. 78 Wis. 2d 416, 254 N.W.2d 310.

33. *Id.* at 424, 254 N.W.2d at 315.

34. *Id.* at 425 n.12, citing DAVIS, ADMINISTRATIVE LAW TREATISE §§ 20.04, 20.05, 20.07, 20.10 (1958).

plaintiff.³⁵ However, in *Nodell Investment*, only the application of a rule was challenged, not the rule itself.

The inappropriateness of declaratory relief was also emphasized in the recent case of *Kosmatka v. Department of Natural Resources*.³⁶ The plaintiffs failed to seek judicial review of a Department of Natural Resources (DNR) order which denied them a permit to construct a U-shaped enclosed swimming area into a lake, although the twenty-four by twenty-eight foot structure had already been built and in use for five years before the order. When the plaintiffs brought an action to declare that their use of the structure was legal and proper, the DNR answer alleged that a criminal citation had been issued against one of the plaintiffs relating to the same matter and that declaratory relief was thus unavailable. Citing section 227.15, the court held that it was the exclusive remedy for review of a DNR order and the plaintiffs could not circumvent that order by means of a declaratory judgment. The right to appeal an administrative ruling is dependent upon strict compliance with chapter 227 and the plaintiffs' failure to appeal the original DNR order prevented judicial consideration at this point.³⁷ The plaintiffs had foregone their right to review when they chose to ignore the original DNR order.

Returning now to the problem as originally posed, whether cases portend future difficulty in complying with legislative intent in the amendment of sections 227.15 and 227.16, some answers may be ferreted out. First, the substitution of "adversely" for "directly" was intended to provide standing for public interest groups, as will be discussed at a later point in this article. Second, the substitution of "substantial interests" for "legal rights and duties" was intended to broaden the type of administrative decisions reviewable. The phrase, "whether by action or inaction," was added for the same reason.

In *Pasch*, the refusal of the Tax Appeals Commission to quash the assessment of additional income taxes and to dismiss for lack of jurisdiction was held not to directly affect the legal rights, duties or privileges of the taxpayer because the jurisdiction of the Commission could be challenged upon review of the

35. WIS. STAT. § 227.05(1) (1975).

36. 77 Wis. 2d 558, 253 N.W.2d 887 (1977).

37. *Id.* at 568, 253 N.W.2d at 892. The court also determined that the controversy was not "ripe" because the declaration of rights by the trial court was so tentative and contingent on DNR action. *Id.*

final decision on the merits of the controversy.³⁸ While it did not so state, the court was actually applying the doctrine of primary jurisdiction and was determining that the administrative agency was the proper forum in which the taxpayer must proceed at this stage of the controversy. In terms of the present statutory language, the administrative decision that the agency had jurisdiction adversely affected the substantial interests of the taxpayer; he was then forced to defend the action on its merits and expend time and money, on issues which would be moot if no jurisdiction existed. Turning to the "commingling of issues" reasoning of the court, the new statute does not seem to help the taxpayer as much. The court suggested that a taxpayer cannot select one of several issues and obtain judicial review, because all of the issues constituted only one proceeding and all issues can be raised on appeal. The taxpayer was arguing that the assessment was null and void for want of timeliness.³⁹ This was not a jurisdictional question and it is not likely that a Wisconsin court will ever hold a determination of such an issue immediately reviewable when, as was the case in this instance, other issues remained to be decided (*i.e.*, the reasonableness of the interest and penalties to be charged).

The 1977 *Friends of the Earth* case⁴⁰ would fare no better under the new statute. The "Friends of the Earth" organization relied upon *Pasch* for the proposition that immediate judicial review is available where it is shown that irreparable harm will result unless judicial relief is granted.⁴¹ A careful reading of *Pasch* discloses, however, that the only reference to "irreparable injury" was in a quotation from *Columbia System v. United States*,⁴² and the *Pasch* court reached its result primarily on the basis of the language of the statute in effect at that time, not upon a finding of irreparable injury. Despite this, the court in *Friends of the Earth* proceeded to analyze the Public Service Commission (PSC) order in terms of possible irreparable injury and found that the claimed harm to the environment was too remote.

38. 58 Wis. 2d at 357, 206 N.W.2d at 162.

39. *Id.* at 358, 206 N.W.2d at 163.

40. 78 Wis. 2d 388, 254 N.W.2d 299 (1977).

41. *Id.* at 409, 254 N.W.2d at 307.

42. 316 U.S. 407 (1942), *quoted at* 58 Wis. 2d at 356, 206 N.W.2d at 162.

Assuming that "Friends of the Earth" has standing to obtain judicial review of a PSC order granting interim rate relief to a gas and electric utility, the new review statute would clearly not require irreparable injury in order for an administrative decision to be reviewable. The use of the reasoning by which "Wisconsin's Environmental Decade" was found to have standing in a recent case⁴³ is helpful to show that an agency decision adversely affects the substantial interests of a public interest organization. Allegation of injury to aesthetic, conservation or recreational interests is sufficient to confer standing⁴⁴ and should be sufficient to constitute adverse effect of substantial interests. In any event, irreparable injury as a prerequisite to judicial review of an agency decision should no longer be required.

Thus, when the Wisconsin court is faced with the review issues exemplified by the *Pasch* and *Friends of the Earth* cases under the present statutory language, and the reasoning must fit under the broader statute, the results should differ. Moreover, if the court places any weight on the legislative intent as interpreted by the Judicial Council notes on the original bill, additional reasons will be found to expand the class of administrative decisions now reviewable. Whether this would be preferable as a policy matter is debatable, depending upon the viewpoint of the particular party to the administrative matter. The ultimate issue is whether to accord agencies more autonomy in their decisions, *i.e.*, whether the judicial branch should transfer power downward in the interest of expediency. If judicial workload continues to be a prime factor in policy decisions, as it seems to be in many areas of the law, courts will continue to require complete exhaustion of the administrative processes before review is obtainable.⁴⁵

B. Standing

In the above discussion, the question of standing was ignored. Standing, however, is fundamental and its absence is an

43. *Wisconsin's Environmental Decade, Inc. v. Public Ser. Comm'n*, 69 Wis. 2d 1, 230 N.W.2d 243 (1975).

44. *Id.* at 10, 230 N.W.2d at 248.

45. Decisions under the new statute are being handed down by trial courts, of course. In *Wisconsin's Environmental Decade v. Public Serv. Comm'n*, No. 156-372 (Dane Cir. Ct., Sept. 26, 1977) the Dane County Circuit Court held a decision not to investigate was not reviewable.

insurmountable obstacle to judicial review.⁴⁶ A major case in the development of the law of standing to appeal administrative decisions is *Wisconsin's Environmental Decade, Inc. v. Public Service Commission*,⁴⁷ which involved the standing of a nonprofit, nonstock corporation engaged in public interest activities to obtain review of a PSC order placing limitations on the sale of natural gas by the Wisconsin Public Service Corporation.

The court observed that the Wisconsin rule of standing envisions a two-step analysis conceptually similar to that required under the federal rule: (1) Does the decision of the agency directly cause injury to the interest of the petitioner? (2) Is the interest asserted recognized by law?⁴⁸ Concluding that the law of standing should not be construed narrowly or restrictively,⁴⁹ and noting carefully that Wisconsin's Environmental Decade (WED) petition alleged that three of its members were natural gas customers in the geographical area affected,⁵⁰ the court found that WED was within the broad zone of protected interests under the Wisconsin Environmental Protection Act, the weapon relied upon by WED to oppose the administrative order.

With respect to the first step in the analysis, the question of whether under the 1971 language of the statute the agency decision directly affected WED, the court easily provided an affirmative answer. Rejecting the argument of the Public Service Commission that the alleged injuries were too speculative or remote, the court held that the series of events which would be initiated by the agency action would be sufficient to justify the conclusion that the order of the agency directly caused injury to the petitioner WED. Remoteness of time between the injury and the sequence of events set in motion by the agency action being challenged should not be determinative in the question of standing.⁵¹ The court's construction of the statute is as broad in this regard as is possible under the statutory language.

46. On standing, generally, see DAVIS, ADMINISTRATIVE LAW TREATISE §§ 22.00-22.21 (Supp. 1970). Davis, *The Liberalized Law of Standing*, 37 U. CHI. L. REV. 450 (1970).

47. 69 Wis. 2d 1, 230 N.W. 2d 243 (1975).

48. *Id.* at 10, 230 N.W.2d at 248.

49. *Id.* at 13, 230 N.W.2d at 249.

50. *Id.* at 15, 230 N.W.2d at 250.

51. *Id.* at 14, 230 N.W.2d at 250.

The explanatory notes adopted by the Wisconsin Judicial Council to accompany the text of the bill amending the Administrative Procedure Act point out that the intent was to include public interest groups as parties having standing under section 227.15: "The word 'adversely' is substituted for the word 'directly' to avoid the semantic quibble over standing through public interest groups."⁵² If the Council had the case before it when the amendment of the statute was being contemplated, the amendment might not have been deemed to be necessary. The statute does not seem to enlarge upon the law of the case.

As previously noted in this article, the substitution of "adversely" for "directly" does not necessarily expand the class of persons referred to in section 227.15, which specifies what orders are reviewable. In any event, to qualify for judicial review, not only must the order be reviewable under section 227.15, but the appellant must be within the class of persons stated in section 227.16:

227.16 Parties and proceedings for review. (1) Except as otherwise specifically provided by law, any person aggrieved by a decision specified in s. 227.15 shall be entitled to judicial review thereof as provided in this chapter.⁵³

Prior to the 1975 amendments, this statute included the requirement that the "person aggrieved" be "directly affected" by the decision for it to be reviewed.⁵⁴ The Judicial Council was clear in its reasons for eliminating the language, "directly affected." In its note to section 227.01(6), which defined "party" as "[a]ny person whose substantial interests may be adversely affected by any proposed agency action,"⁵⁵ the Council stated:

The purpose of this definition is to indicate a very broad basis for standing in administrative proceedings. It is intended to follow the direction of recent federal cases under the Federal Administrative Procedure Act in broadening the concept of

52. 1975 Wis. Assembly Bill 163, Judicial Council Note, *enacted in 1975 Wis. Laws*, ch. 414. Senate Bill 180, being considered in the current legislative session, would provide an assistant attorney general as "people's utility counsel" in PSC utility rate cases. Consumers would theoretically have a spokesman with expertise to match utility experts in rate proceedings. This is the goal of the public interest organizations which have recently been appearing in rate cases.

53. WIS. STAT. § 227.16 (1975).

54. WIS. STAT. § 227.16 (1973).

55. WIS. STAT. § 227.01(6) (1975).

standing and to establish the right of the attorney general or any agency to party status upon request.⁵⁶

Expanding the class of persons having standing during the proceedings of an administrative agency does not necessarily also expand the class eligible to obtain judicial review if it is true that access to the judiciary is strictly limited by statute. It must be kept in mind that the question in many instances is not whether a party will ever attain judicial review, for it is likely that there will be only a few instances in which some sort of judicial review will not eventually be obtainable. A crucial question in many cases, including those already discussed herein, is the timing of the review. If the time and expense of a lengthy administrative proceeding can be avoided by judicial determination that such proceeding is unwarranted or unnecessary, this is, of course, preferable. On the other hand, courts will not countenance constant interruption of administrative proceedings and a shifting back and forth between the agencies and the courts.⁵⁷

Turning now to the second of the two steps in the Wisconsin rule for determining standing as espoused in the 1975 *Environmental Decade* case,⁵⁸ a seemingly broader analysis is warranted. If the decision of the agency directly causes injury to the petitioner ("adversely" affects under present statutory language), is the interest asserted recognized by law? In the *Environmental Decade* case the environmental group asserted that the use of dirty fuels by lower priority customers was a violation of the Wisconsin Environmental Protection Act and WED's interest in preventing such use should be legally recognized under the Wisconsin rule for determining standing.⁵⁹ Since this was a case of first impression, WED cited the navigable waters public trust doctrine as precedent.⁶⁰ The court

56. 1975 Wis. Assembly Bill 163, Judicial Council Note, enacted in 1975 Wis. Laws ch. 414. The federal Administrative Procedure Act differs from the language chosen by the Judicial Council: "A person suffering legal wrong because of agency action within the meaning of a relevant statute, is entitled to judicial review thereof." 5 U.S.C. § 702 (1970).

57. This is the argument made in *City of West Allis v. Wisconsin Employment Relations Comm'n*, 72 Wis. 2d 268, 240 N.W.2d 416 (1976). See note 23, *supra*.

58. 69 Wis. 2d at 10, 230 N.W.2d at 248. See text accompanying note 48, *supra*.

59. *Id.* at 14, 230 N.W.2d at 250.

60. *Daley v. Natural Resources Bd.*, 60 Wis. 2d 208, 208 N.W.2d 839 (1973); *Just v. Marinette County*, 56 Wis. 2d 7, 201 N.W.2d 761 (1972); *Muench v. Public Serv. Comm'n*, 261 Wis. 492, 53 N.W.2d 514, 55 N.W.2d 40 (1952).

doubted that the Environmental Protection Act established a public trust comparable to that created in navigable waters, but did concede that the legislative intent was comprehensive and that any person residing in the area most likely to be affected by the agency action might be sufficiently affected to have a legally protectable interest.⁶¹ Having adopted this logic, the finding of standing for the organization was assured.

Under the present statutory language, a court must still determine whether the interest asserted by the party seeking judicial review is of a species warranting the attention of the courts, but the language of the test should track the statute. Having eliminated the necessity of determining the immediacy or proximity of the effect of the agency decision, the statute now requires that "substantial" interests should be adversely affected for judicial review to be in order. In its explanatory notes, the Judicial Council argued that although the amendment was intended to broaden the class of persons having standing by use of the phrase "substantial interests are adversely affected,"⁶² it was also intended that the aggrieved person suffer some injury, however slight.⁶³ Thus, the issue of standing is to be resolved in favor of the party seeking review, whenever possible.

Referring now to the specific words of the statute, the 1975 amendments greatly simplified the test. To have standing for review, all that need be shown is that the person is aggrieved by the administrative decision; it need not be shown that the person was directly affected by such decision. The definitions section further clarifies the statute: "A 'person aggrieved' includes any person or agency whose substantial interests are adversely affected by a determination of an agency."⁶⁴ Quite obviously, the legislative intent was to broaden standing for judicial review.

A number of decisions had occasion to interpret the term "person aggrieved." In the *Pasch* case, already discussed, the taxpayer was held not to be an aggrieved party.⁶⁵ Nor was an agency official an aggrieved party merely because of his inter-

61. 69 Wis. 2d at 18, 230 N.W.2d at 252.

62. WIS. STAT. § 227.15 (1975).

63. 1975 Wis. Assembly Bill 163, Judicial Council Note, *enacted in* 1975 Wis. Laws, ch. 414.

64. WIS. STAT. § 227.01(8) (1975).

65. 58 Wis. 2d at 357, 206 N.W.2d at 163.

est in seeing his decision upheld in court when the agency board reversed him.⁶⁶ A financial interest which is only remote is insufficient to create aggrieved party status.⁶⁷ Conversely, a town was held to be an aggrieved party for review of a sewage treatment plan approved by the State Board of Health where the proposed facility might have polluted a lake in the town.⁶⁸ Also, a town was an aggrieved party for purposes of review of an order by the Public Service Commission denying the town the right to build a bulkhead line (behind which swampy land could be filled in) in a river.⁶⁹

Prior to the enactment of a definition of aggrieved party in section 227.01(8), the Wisconsin court relied upon the judicial definition contained in *Greenfield v. Joint County School Commission*.⁷⁰ An aggrieved party was "one having an interest recognized by law in the subject matter which is injuriously affected by the judgment."⁷¹ Under this test, the *Pasch* court found no standing for the taxpayer appealing his income tax assessment. However, it would seem that the same logic which, under section 227.15, would allow a court to find that the administrative decision was reviewable would also allow a finding that the taxpayer had standing to pursue that review. A decision by an agency that it has jurisdiction in a disputed matter certainly adversely affects the substantial interests of the party who must now adjudicate the merits of the matter before the agency prior to obtaining judicial review of the jurisdictional question. At any rate, this result apparently coincided with the expressed legislative intent, as indicated in the Judicial Council notes.⁷²

66. *Mortenson v. Pyramid Sav. & Loan Ass'n*, 53 Wis. 2d 81, 191 N.W.2d 730 (1971).

67. *Wisconsin Power & Light Co. v. Public Serv. Comm'n*, 45 Wis. 2d 253, 172 N.W.2d 639 (1969).

68. *Town of Norway v. State Bd. of Health*, 32 Wis. 2d 362, 369-70, 145 N.W.2d 790, 794 (1966). The town board had passed a resolution pursuant to Wis. STAT. § 60.18(12) (1961) authorizing it to exercise the powers of a village board, which included the right to manage and control navigable water.

69. *Town of Ashwaubenon v. Public Serv. Comm'n*, 22 Wis. 2d 38, 47-48, 125 N.W.2d 647, 652, *reh. denied*, 22 Wis. 2d 55a, 126 N.W.2d 567 (1964).

70. 271 Wis. 442, 73 N.W.2d 580 (1955).

71. *Id.* at 447, 73 N.W.2d at 583.

72. 1975 Wis. Assembly Bill 163, Judicial Council Note, *enacted in* 1975 Wis. Laws ch. 414, §5.

V. CONCLUSION

Although standing to appeal administrative decisions will probably continue to be liberally interpreted, the Wisconsin Supreme Court does not seem willing to expand the class of decisions subject to judicial review. The court demonstrates no inclination to allow utilization of common law judicial remedies, nor does it construe the statutory authority liberally. If there is no clear intent on the part of the legislature to permit judicial review of a particular type of administrative decision, the court usually finds that the judicial system has no jurisdiction in the matter. The doctrines of exhaustion of administrative remedies and primary jurisdiction are frequently relied upon to retain the matter within the agency adjudication until a later time in the proceeding. While adhering to the doctrine of eventual judicial review of all administrative matters, the court prefers that the agency adjudicate the merits of the controversy before review is permitted.

This tendency may seem harsh to those who believe that the adjudicatory skills of the judicial branch of government are vastly superior to those of the administrative branch. The harshness is magnified in the case of an agency which may often be arbitrary in its quasi-judicial decisions. It may be time consuming and expensive to be required to defend administrative action to a point in the proceedings where it is determined that the agency had no jurisdiction or that some other basic threshold issue should have been decided in favor of a party earlier. However, the alternative, earlier or easier access to the courts, is not particularly attractive, assuming that the matter will progress more slowly in the courts and at a greater expense.

This propensity for discouraging immediate access to the courts does, of course, result in administrative agencies gaining more power and discretion in adjudication. That this has been the trend since the inception of the administrative law system is not to be denied, nor is it necessarily reprehensible. What is unfortunate is the fact that there is a complete segregation of the administrative and judicial branches of government and this results in waste of time and resources in appealing from the lower to the higher branch. If the party aggrieved were to obtain a day in court at the lower level of proceedings, constitutional issues could be avoided and the citizenry would be much more likely to be satisfied with the result, even if unfavorable. When the agency is the lesser branch of government, and the

court has the final word in the matter, satisfaction with agency decision-making is not possible in many, if not most, instances.

Some type of fusion, perhaps a merger, might solve this conceptual problem. When administrative agencies are given full judicial rather than quasi-judicial powers, many of the problems addressed in this article will evaporate. However, the legislatures of the several states are not predisposed in this direction. In fact, the trend is to further refine the procedural techniques with which a case moves from one separate branch of government to another, higher branch, thus further reinforcing the differentiation.

As has been indicated, the intent of the Wisconsin legislature was to broaden the class of cases reviewable, at least if the Judicial Council notes are representative of that intent. The most recent Wisconsin cases view accessibility to review quite strictly and one wonders whether the legislative intent will greatly influence the court if it is found that the statutory language itself is not ambiguous. For example, it has been argued in this article that the substitution of "substantial interests" for "legal rights, duties or privileges" replaces a narrow, unambiguous term with a broad term capable of a wide variety of interpretations. If a reviewing judge determines that "substantial interests" is as ambiguous a term as it seems to be, it can be argued that the legislative history should be consulted. Contrarily, the judge has the prerogative to find that the meaning of the term is clear as applied to the facts of the case and the legislative history then becomes irrelevant. These alternatives are and should be within the authority of the judicial branch.

In attempting to predict the future, it is to be hoped that the Wisconsin court may be persuaded to somewhat expand the scope of the statute to encompass administrative decisions not previously reviewable. However, it is probable that in the vast majority of cases the court will continue to refuse to review until the administrative body has reached a result on the merits. This, after all, is the result most likely to save the litigant time and expense in most instances.

